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In the Supreme Court of the United States

OCTOBER TERM, 1960

ADDIE MAE ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 131-132) is reported at 283 F. 2d 376.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1960. A petition for rehearing *en banc* was denied on November 28, 1960. On December 28, 1960, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to January

18, 1961. The petition was filed on January 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a judgment of acquittal on the ground of temporary insanity.

2. Whether the government's closing argument deprived petitioner of due process.

STATEMENT

Petitioner was convicted of second-degree murder by a jury in the District Court for the District of Columbia and was sentenced to imprisonment for a period of three to twenty years (R. 128). The court of appeals affirmed in a *per curiam* opinion (R. 130-131).

1. *The crime.*—The sufficiency of the evidence of the crime is not here in issue. On September 10, 1959, petitioner who had armed herself with a loaded pistol, went to look for her husband and the deceased, his supposed paramour. Petitioner claimed she had decided to "scare" the deceased (R. 71). Petitioner saw her husband and the deceased in her husband's car. When petitioner reached the car, her husband started the motor and pulled away (R. 12, 80). At that moment the gun discharged (R. 12.) Petitioner fell from the car and was dragged a half block (R. 80). Her husband, who was hit in the shoulder by the bullet, drove the deceased to the hospital (R. 13). Petitioner recovered the pistol from the street (R.

81). She was arrested at the rear of her home and the gun was found between the garbage pail and porch of her home (R. 21-22).

2. *The evidence on insanity.*—The defense presented Dr. Michael M. Miller, psychiatrist, who had examined petitioner for two and a half hours on December 11, 1959 (R. 45).[1] He stated that it was his opinion that on September 10, 1959, petitioner "was in an acute state of emotional agitation" (R. 45). He testified this was "not mental illness, it was a kind of extreme emotional reaction * * *" (R. 49). He was of the view that because of this mental impairment she could not act rationally (R. 49). On cross-examination, the doctor acknowledged he belonged to the school of psychiatry that "would say that people who commit serious crimes are mentally disturbed" (R. 56).

The defense also called Dr. Charles H. Epps, Jr. who had treated petitioner on September 11 and 12 for her physical injuries (R. 60). He read a psychiatric evaluation prepared by Dr. A. D'Agostino, which was in part as follows (R. 62-63):

> There is no history of previous nervous breakdown or hospitalization for mental disorder. There was no admittance of auditory, visual or tactile hallucinations, no paranoid delusions are elicited.
>
> Her speech is coherent. There is no pressure flight of ideas. Affect and thought content are appropriate and adequate under the circumstances.

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[1] Trial commenced on December 14, 1959 (R. 2).

Impression: Depressed state due to situation of reaction.

In rebuttal, the government called Dr. Gerhard J. Gordon. He stated he could not form an opinion of petitioner's sanity at the time the crime was committed based solely on a hypothetical question encompassing the evidence, but that, if petitioner was confused and could not recall what was going on, she might possibly have been in a state amounting to insanity (R. 103).

3. *Closing argument by the government.* — Petitioner presented two ministers as character witnesses. Both were connected at one time with the Baptist Church (R. 70). Both testified that petitioner's reputation for truth and veracity was very good (R. 69, 70). On cross-examination the government asked one of them (R. 69):

> Q. As a matter of fact, you [would] come down here and testif[y] for any of your flock, wouldn't you?
>
> A. Why, yes, sir, I would do that, yes, sir.

In closing argument, counsel for petitioner claimed that the government "tried to dilute [the character evidence] on cross-examination without success" (R. 109). The government in closing argument stated (R. 110-111):

> Now, as to character testimony; you weigh that testimony the same as you do any other testimony. Anybody who's going to church can get a—going to a Baptist Church in this city—and I can say it loud because I was born in the Baptist church and I intend to die there, and I

mean no reflection on a Baptist church—but she brought her minister here. She paid her dues. He would have come down here for any of his flock—and I don't mean any disrespect for him in that respect because, after all, he is a minister of the gospel and is out to save souls and he'll never concede that it's too late. There is always hope to save a soul. So even if a member of his flock strayed from the path, he came down to help her.

ARGUMENT

1. Petitioner claims (Pet. 6) that she was entitled to a judgment of acquittal on her defense of insanity at the time of the crime. The standard set by this Court in *Davis* v. *United States*, 160 U.S. 469, 488, was that:

> If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. * * *

Applying this standard to this case, the record shows that petitioner was not entitled to have a judgment of acquittal directed by the court. As the Court of Appeals for the District of Columbia stated in its *per curiam* opinion (R. 132): "On the testimony here, the issue was properly one for the jury * * *."

The evidence of Dr. Miller who examined petitioner for 2½ hours, 3 months after the crime and a few days before trial, is singularly weak and equivocal.

He stated petitioner was suffering from "a kind of extreme emotional reaction," not from a mental illness; that this emotional condition prevented her from acting rationally (R. 49); and that it was "very difficult to say" whether she could distinguish right from wrong (R. 47). He further testified that he believed that all who commit serious crimes are mentally disturbed (R. 56). Opposed to this there was the psychiatric report of Dr. D'Agostino, made one day after the commission of the crime, which found no evidence of any type of insanity.[2] In addition Dr. Gordon gave his opinion that petitioner might be deemed insane if she was so confused that she could not act rationally or could not recall what had happened. Since petitioner had taken the stand and had clearly related all her movements, there was no lack of recall to support a plea of insanity.

2. Petitioner complains (Pet. 4) of the government's closing argument. The government's statement that a minister would give character testimony "for any member of his flock" was based directly on what the minister had specifically acknowledged on cross-examination. Thus, unlike *Berger* v. *United States*, 295 U.S. 78, this statement was not a substitution of the personal knowledge of the prosecutor for the evidence. Moreover, petitioner's experienced trial counsel apparently considered the remarks as proper since he remained silent and interposed no objection.

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[2] Petitioner suggests (Pet. 7) that this report was hearsay. This objection is hardly available to him, since the report was introduced by petitioner's own witness and with no objection at the trial.

Petitioner cannot be heard to raise this objection for the first time on appeal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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